

IN THE  
MISSOURI SUPREME COURT

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IN THE MATTER OF THE                    )  
CARE AND TREATMENT OF                )     No. SC 87804  
MARK MURRELL,                            )  
  )     Appellant.                                )

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APPEAL TO THE MISSOURI SUPREME COURT  
FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI  
SIXTEENTH JUDICIAL CIRCUIT, PROBATE DIVISION  
THE HONORABLE KATHLEEN FORSYTHE, JUDGE

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APPELLANT'S REPLY BRIEF

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## **JURISDICTIONAL STATEMENT**

This cause was transferred to this Court by the Western District Court of Appeals as within this Court's exclusive jurisdiction over challenges to the constitutionality of Missouri statutes. Missouri Constitution, Article V, Section 3.

## **STATEMENT OF FACTS**

Mr. Murrell incorporates the statement of facts set out in pages 8 through 24 of his initial brief.

## POINTS RELIED ON

### I.

The trial court erred when it denied Mr. Murrell's motion to dismiss the State's petition because Sections 632.480 RSMo, et seq. (Cum. Supp. 1999) ("the SVP statute") violate the Due Process Clauses of Article I, Section 10 of the Missouri Constitution and the Fourteenth Amendment to the United States Constitution, in that the SVP law permits the State to deprive a person of their liberty upon proof that he suffers from a mental abnormality that predisposes him to, and makes it more likely than not, that he will commit sexually violent offenses, but does not require a risk that he is likely to do so in the immediate future. Due process requires that no person be involuntarily committed except upon proof that, as a result of that mental abnormality, he poses an imminent risk of harm. Thus, Mr. Murrell was deprived of his liberty pursuant to a statute which, on its face and as applied, violates the guarantees of due process of law.

*In the Matter of the Care and Treatment of Stephen Elliott, SC*

87746;

United States Constitution, Fourteenth Amendment; and

Missouri Constitution, Article I, Section 10.

## II.

The probate court erred in committing Mr. Murrell to indefinite secure confinement in the custody of the Department of Mental Health, in violation of Mr. Murrell's right to due process of law as guaranteed by the Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the evidence was insufficient to prove beyond a reasonable doubt that Mr. Murrell is more likely than not to engage in predatory acts of sexual violence in the future - if not securely confined - as a result of the diagnosis of antisocial personality disorder because this condition is insufficiently precise to identify a mental abnormality limited to future risk of sexual offending, but rather suggests only a propensity to criminality, rendering the commitment a "mechanism for retribution or general deterrence," functions properly those of criminal law, not civil commitment.

*In the Matter of the Care and Treatment of Norton*, 123 S.W.3d

170 (Mo. banc 2004);

*Linehan v. Milczark*, 315 F.3d 920 (8<sup>th</sup> Cir. 2003);

*In the Matter of the Care and Treatment of Pate*, 137 S.W.3d 492

(Mo. App., E.D. 2004);

*In the Matter of the Care and Treatment of Heikes*, 170 S.W.3d 482

(Mo. App., W.D. 2005); and

Missouri Constitution, Article I, Section 10.

### III.

The probate court abused its discretion in admitting evidence that Mr. Murrell suffers antisocial personality disorder, in violation of his rights to due process of law and a fair trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 and 18(a) of the Missouri Constitution, in that a personality disorder cannot satisfy the statutory requirement of a “mental abnormality” because it fails to distinguish a condition specifically predisposing a person to commit a sexually violent offense from a personality disposed to criminal or unacceptable conduct in general, subjecting Mr. Murrell to involuntary civil confinement outside the narrow authority granted to the government.

*In the Matter of the Care and Treatment of Heikes*, 170 S.W.3d 482

(Mo. App., W.D. 2005);

*In the Matter of the Care and Treatment of Pate*, 137 S.W.3d 492

(Mo. App., E.D. 2004);

*Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072,287, 138 L.Ed.2d

501 (1997); and

Missouri Constitution, Article I, Section 10.

#### IV.

The trial court abused its discretion in admitting Dr. Hoberman's testimony, over Mr. Murrell's objection, on the results of the Static-99 and MnSOST-R actuarial instruments applied to him by Dr. Hoberman, in violation of Mr. Murrell's right to due process of law and a fair trial, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 and 18(a) of the Missouri Constitution, in that the results were logically and legally irrelevant since they do not address the specific question at issue whether - Mr. Murrell is more likely than not to reoffend - and they confuse the issue and mislead the jurors because the actuarial instruments reflect only the results of group analysis, the similarities between the sample group and Mr. Murrell or any other individual is unknown, and the group results cannot predict the behavior of any specific individual.

## ARGUMENT

### I.

The trial court erred when it denied Mr. Murrell's motion to dismiss the State's petition because Sections 632.480 RSMo, et seq. (Cum. Supp. 1999) ("the SVP statute") violate the Due Process Clauses of Article I, Section 10 of the Missouri Constitution and the Fourteenth Amendment to the United States Constitution, in that the SVP law permits the State to deprive a person of their liberty upon proof that he suffers from a mental abnormality that predisposes him to, and makes it more likely than not, that he will commit sexually violent offenses, but does not require a risk that he is likely to do so in the immediate future. Due process requires that no person be involuntarily committed except upon proof that, as a result of that mental abnormality, he poses an imminent risk of harm. Thus, Mr. Murrell was deprived of his liberty pursuant to a statute which, on its face and as applied, violates the guarantees of due process of law.

This issue was also raised in *In the Matter of the Care and Treatment of Stephen Elliott*, SC 87746, and argued to this Court on September 14, 2006. Mr. Murrell will not repeat those arguments here.

## II.

The probate court erred in committing Mr. Murrell to indefinite secure confinement in the custody of the Department of Mental Health, in violation of Mr. Murrell's right to due process of law as guaranteed by the Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the evidence was insufficient to prove beyond a reasonable doubt that Mr. Murrell is more likely than not to engage in predatory acts of sexual violence in the future - if not securely confined - as a result of the diagnosis of antisocial personality disorder because this condition is insufficiently precise to identify a mental abnormality limited to future risk of sexual offending, but rather suggests only a propensity to criminality, rendering the commitment a "mechanism for retribution or general deterrence," functions properly those of criminal law, not civil commitment.

"The goal of Missouri's sexually violent predator law is to target the offenders with a high probability of recidivism and those who have committed the most atrocious sex crimes. Given the public's natural revulsion for all sex crimes, the temptation to apply the law indiscriminately must be resisted to avoid embarking on a collision course with due process." *In the Matter of the*

*Care and Treatment of Norton*, 123 S.W.3d 170, 182, (Mo. banc 2004) (Judge Wolff, concurring).

In contrast, the State now argues: “Murrell’s argument is based on a false premise: that the state must show that his serious difficulty in controlling his behavior is limited to difficulty controlling sexual behavior.” (Resp. Br. 41). The State has removed the context in which sexually violent predator laws have been enacted and upheld. But the law and the evidence cannot be reviewed without this context. When discerning the meaning and purpose of a statute, “a proper analysis ... considers the context in which the words are used and, importantly, the problem the legislature sought to address with the statute’s enactment. It is fundamental that a section of a statute should not be read in isolation from the context of the whole act.” *City of Springfield v. Coffman*, 979 S.W.2d 212, 214, (Mo. App., S.D. 1998).

The State defends its position with *Kansas v. Crane*, 534 U.S. 407, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002), noting that under *Crane* the State is not required to prove that the person has absolutely no control over his behavior. (Resp. Br. 42). It is certainly true that the Court stated, “[i]t is enough to say that there must be proof of serious difficulty controlling behavior.” 543 U.S. at 413, 122 S.Ct. at 870. But again, the State ignores the context of this statement. The uncontrolled behavior must distinguish a sexually violent predator from a dangerous but

typical criminal recidivist subject only to criminal law. In this context that must necessarily mean sexual behavior.

The State returns to *Linehan v. Milczark*, 315 F.3d 920 (8<sup>th</sup> Cir. 2003), to further its argument. But as Mr. Murrell demonstrated in his initial brief, the Minnesota Supreme Court and the Eighth Circuit Court of Appeals discussed the diagnosis and evidence in the appropriate context; the individual's sexual behavior. Indeed, the language from those Courts quoted in the State's brief undermines its position. The State quoted from the Minnesota Supreme Court's opinion that a Sexually Dangerous Person subject to commitment under that state's law is those persons:

who have engaged in a prior course of **sexually harmful behavior** and whose present disorder or dysfunction **does not allow them to adequately control their sexual impulses**, making it highly likely that they **will engage in harmful sexual acts in the future.**

315 F.2d at 924. (Resp. Br. 36) (emphasis added). The State tries to interpret the Eighth Circuit Court of Appeal's decision to also remove the context of sexual behavior when discussing the level of control the person has over behavior. The opinion of the Eighth Circuit precludes that interpretation. In affirming the lower court's ruling, the Eighth Circuit noted that "[t]he [Minnesota Supreme] court reasoned that although 'some lack of volitional control is necessary to narrow the scope of civil commitment statutes,' *Hendricks* does not require proof

that a person lack total control over his **sexual behavior.**” 315 F.3d at 927 (emphasis added).

The State’s evidence totally failed to establish that Mr. Murrell has serious difficulty controlling his sexual behavior sufficient to distinguish him from a typical criminal recidivist necessary to subject him to involuntary civil commitment. Having failed to provide such proof, the State now claims that such proof is unnecessary. Having eschewed the context authorizing civil commitment under SVP laws, the State has lost the authorization for such commitments granted by the various federal and state courts which have spoken on the question.

The State exacerbates this error of generalization by ignoring the other failure of its evidence below: the failure to prove that Mr. Murrell has a mental abnormality **predisposing** him to commit sexually violent acts. The State only offered a diagnosis from DSM-IV TR which describes behavior but makes no claim to identify the motivation for that behavior. The State does not even address in its brief Mr. Murrell’s argument set out in his initial brief that the diagnosis and evidence failed to prove a propensity to commit sexually violent acts as required by Section 632.480 and *Thomas v. State*, 74 S.W.3d 789 (Mo. banc 2002). Instead, the State only argues that Mr. Murrell cannot control his behavior in general, and proceeds as if this is enough.

The State's erroneous assumption seems to be that Mr. Murrell is predisposed to commit sexually violent acts because he has committed sex crimes in the past. This was Dr. Hoberman's erroneous assumption. When asked by the State why he believed Mr. Murrell was predisposed to commit sexually violent offenses Dr. Hoberman answered: "it is that combination of personality traits that makes Mr. Murrell commit sex offenses as well as other violent offenses, but he commits sex offenses when he sees something, he has an opportunity or he creates an opportunity for sexual offenses, he goes for it so to speak." (Tr. 430). This answer neither distinguishes Mr. Murrell from a typical recidivist ("makes Mr. Murrell commit sex offenses as well as other violent offenses") nor identifies a particular predisposition to sexual offending ("when he sees something ... he goes for it").

The State relied upon *In the Matter of the Care and Treatment of Pate*, 137 S.W.3d 492 (Mo. App., E.D. 2004), and *In the Matter of the Care and Treatment of Heikes*, 170 S.W.3d 482 (Mo. App., W.D. 2005), to argue that "APD is a mental abnormality that can support an ultimate finding that the person is an SVP." (Resp. Br. 34). But both these cases demonstrate the insufficiency of the State's evidence in Mr. Murrell's case.

Of significance in *Pate* was evidence that "this disorder manifested itself through a *pattern of sexual aggression targeted at women* when Pate feels as though a woman has mistreated him." *Id.* at 497 (emphasis added). This pattern

included four rapes or attempted rapes of teenage or preteen girls over eleven years, and an alleged attempted rape of another woman after Pate was released on parole. *Id.* at 494. And this behavior was not simply the result of APD, but of a different personality disorder, narcissism. *Id.* at 497-498. It was this narcissism that caused Pate to react aggressively when he felt slighted.

The Western District noted that Heikes “had been engaging in predatory sexual behavior since 1971,” including “inappropriate touching and fondling of females, verbally and physically threatening females who did not acquiesce to his sexual demands, spying on females in restrooms and locker rooms, and exposing himself to females.” 170 S.W.3d at 483. Heikes was convicted of rape in 1973 and sexual assault in 2000. *Id.* He had also been charged with open and gross lewdness in 1974 and 1976. *Id.* at 483-484. He was also accused of raping a twelve year old girl. *Id.* at 484. Not only did he present this pattern of sexual offending, but he was diagnosed with voyeurism, a deviant sexual interest in addition to APD. *Id.* The Western District Court of Appeals found the evidence sufficient because:

Heike’s personality and his deviant sexual interests indicate that he is predisposed to commit sexually violent offenses. Heikes has a long-term pattern of sexually criminal behavior, and it appears that Heikes’ sex crimes are becoming more serious and violent.

*Id.*

These cases clearly demonstrate the insufficiency of the evidence the State presented against Mr. Murrell. He has not engaged in a pattern of sexual aggression against women when he feels mistreated or slighted by them. He does not have a deviant sexual interest which contributed to a long-standing and escalating pattern of sexually criminal behavior. The State's evidence against Mr. Murrell offers nothing more than the presence of a criminal-type personality and two instances of sexual offending, sixteen years apart, among many other crimes.

Committing Mr. Murrell without this sexual context violates due process. There is no specific sexual context to the diagnostic label which does nothing more than describe past behavior. There is no specific sexual context of a predisposition to sexual offending. There is no specific sexual context to predicted future behavior. There is no distinction between a typical criminal recidivist and a person specifically subject to civil commitment. Without this specific sexual context the commitment becomes nothing more than detention based on past behavior. The diagnosis of APD is a psychiatric label describing only past behavior. The predisposition is premised only on past offending. And by suggesting that difficulty controlling general behavior rather than control over sexual behavior is sufficient, the State offers nothing more than the specter of Mr. Murrell committing future crimes which might include an opportunistic sex offense. The State is confining Mr. Murrell because he has a criminal-type

personality and committed sexual crimes in the past. This is an improper preventative detention, and borders on double jeopardy.

Because the evidence was insufficient to support Mr. Murrell's involuntary civil commitment, the judgment and order committing him to DMH must be reversed and Mr. Murrell must be discharged.

### III.

**The probate court abused its discretion in admitting evidence that Mr. Murrell suffers antisocial personality disorder, in violation of his rights to due process of law and a fair trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 and 18(a) of the Missouri Constitution, in that a personality disorder cannot satisfy the statutory requirement of a “mental abnormality” because it fails to distinguish a condition specifically predisposing a person to commit a sexually violent offense from a personality disposed to criminal or unacceptable conduct in general, subjecting Mr. Murrell to involuntary civil confinement outside the narrow authority granted to the government.**

The deficiencies in the evidence described above in Point II are inherent in a diagnosis of APD. It does not diagnose a specific deviant sexual interest as does a paraphilia. It only describes what may be criminal behavior in general. And it only labels past behavior, it does not claim to identify a mental motivation for behavior. It does not identify or suggest a specific predisposition to sexually violent behavior. It does not specifically predict or suggest future sexual behavior. These inherent deficiencies render the diagnosis legally insufficient to support involuntary civil commitment as a sexually violent predator, and is therefore inadmissible for that purpose.

At best, APD may be sufficient to support involuntary civil commitment only when combined with some other diagnosis. This is the teaching of the *Pate* and *Heikes* cases cited by the State. Neither case involved a diagnosis of APD alone. In *Pate* the diagnosis was narcissistic personality disorder with antisocial features. 137 S.W.3d at 497-498. One of the characteristic features of a narcissistic personality disorder is a sense of entitlement, i.e., unreasonable expectations of especially favorable treatment or automatic compliance with his or her expectations. Diagnostic and Statistical Manual, Vol. IV, Text Revision. “[T]his disorder manifested itself [in Pate] through a *pattern of sexual aggression targeted at women* when Pate feels as though a woman has mistreated him.” *Id.* at 497 (emphasis added). Pate had a mental condition specifically leading him to engage in sexual aggression against specific victims, not just a history of past criminal behavior in general which garners a diagnostic label. Heikes’ APD was combined with voyeurism, a sexually deviant interest, and it was this combination of his “personality and his deviant sexual interests” which proved sufficient in *Heikes*. 170 S.W.3d at 484.

APD alone is “too imprecise a category to offer a solid basis for concluding that civil detention is justified.” *Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 287, 138 L.Ed.2d 501 (1997) (J. Kennedy, concurring). APD is nothing more than a diagnostic label applied to “a long course of antisocial behavior,” which

Justice Breyer would not accept as sufficient to support civil commitment. 117 S.Ct. at 2088-2089) (J. Breyer, dissenting).

Because a diagnosis of APD fails to qualify as a mental abnormality sufficient to support involuntary commitment as a sexually violent predator, evidence of that diagnosis is not admissible on that issue. The probate court abused its discretion in permitting the State to offer that diagnosis to the jurors as a basis for Mr. Murrell's commitment. The remedy most generally appropriate for admission of improper evidence would be a retrial without that evidence. But since the State's sole basis for Mr. Murrell's civil commitment as a sexually violent predator was the presence of APD, without that evidence the State's evidence is insufficient. The appropriate remedy in Mr. Murrell's case is his discharge from custody.

#### IV.

The trial court abused its discretion in admitting Dr. Hoberman's testimony, over Mr. Murrell's objection, on the results of the Static-99 and MnSOST-R actuarial instruments applied to him by Dr. Hoberman, in violation of Mr. Murrell's right to due process of law and a fair trial, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 and 18(a) of the Missouri Constitution, in that the results were logically and legally irrelevant since they do not address the specific question at issue whether - Mr. Murrell is more likely than not to reoffend - and they confuse the issue and mislead the jurors because the actuarial instruments reflect only the results of group analysis, the similarities between the sample group and Mr. Murrell or any other individual is unknown, and the group results cannot predict the behavior of any specific individual.

## CONCLUSION

Because the SVP act violates due process of law by not requiring proof of current, immediate, or imminent danger to involuntarily commit the person, as set out in Point I, it is unconstitutional. The trial court erred in denying Mr. Murrell's motion to find the statutes unconstitutional and to dismiss the petition against him and Mr. Murrell's commitment must be reversed and he must be released. Because the diagnosed antisocial personality disorder fails to distinguish the dangerous sexual offender whose serious illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case, as set out in Point II, the evidence was insufficient to support Mr. Murrell's civil commitment, and the probate court's judgment and order must be reversed and Mr. Murrell must be released. Because the probate court abused its discretion in permitting evidence of the diagnosis of APD, as set out in Point III, and because it was the sole basis for Mr. Murrell's civil commitment as a sexually violent predator, the judgment of the probate court must be reversed and Mr. Murrell must be released. Because the probate court abused its discretion in permitting evidence regarding the Static-99 and MnSOST-R over Mr. Murrell's objection, as set out in Point IV, his commitment must be reversed and the cause remanded for a new trial.

Respectfully submitted,

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### Certificate of Compliance and Service

I, Emmett D. Queener, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Book Antiqua size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 3,630 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in August, 2006. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 25th day of September, 2006, to Alana M. Barragan-Scott, Deputy State Solicitor, P.O. Box 899, Jefferson City, Missouri 65101.

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